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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1247

FRANKLIN NIX,

Petitioner,

v.

THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petitioner, Franklin W. Nix, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 17, 1971.

OPINIONS BELOW

The opinions of the District Court are unreported and appear in the Appendices hereto as Appendix A and Appendix B. The opinion of the Court of Appeals, reported at 452 F. 2d 794, appears in the Appendices hereto as Appendix C. The opinion of the Court of Appeals upon the petitioner's motion for rehearing and suggestion for rehearing *en banc*, not yet reported, appears in the Appendices hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on November 17, 1971. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on January 5, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a district court may abridge the procedural and substantive requirements of Rules 12 (b) and 56 (c) of the Fed. R. Civ. P., by treating a Rule 12 (b) (6) motion to dismiss as a motion for summary judgment and entering summary judgment thereon based on principles of collateral estoppel when: (1) no matters outside the pleadings were presented to the court by respondent; (2) no record of the prior proceeding alleged to be the basis of collateral estoppel was before the court; (3) no notice was given petitioner of the court's contemplation of summary judgment; and (4) no hearing was afforded petitioner on the issue of summary judgment.

2. Whether, as a matter of law, a union member's private civil action in federal district court under the

Labor-Management Reporting and Disclosure Act of 1959, alleging § 609 unlawful union discipline in reprisal for the exercise of free speech under § 101 (a) (2) of the LMRDA, is barred, under principles of collateral estoppel, by a prior NLRB adjudication of the union member's unfair labor practice charges under §§ 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act.

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 12(b):

How presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for

summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 56(c):
Motion and proceedings thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

§101 (a) (2) LMRDA, 29 U.S.C. §411 (a) (2):
Freedom of speech and assembly.

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and

to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

§102 LMRDA, 29 U.S.C. §412:

Civil action for infringement of rights; jurisdiction.

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

§103 LMRDA, 29 U.S.C. §413:

Retention of existing rights of members.

Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

§609 LMRDA, 29 U.S.C. §529:

Prohibition on certain discipline by labor organization.

It shall be unlawful for any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section.

STATEMENT OF THE CASE

This action was instituted on June 3, 1970, in the United States District Court for the Northern District of Georgia by petitioner Franklin W. Nix, against the International Association of Machinists and Aerospace Workers (Union). Petitioner invoked the jurisdiction of the district court under § 102 of the Labor-Management Reporting and Disclosure Act of 1959 [LMRDA], 29 U.S.C. § 412. Petitioner alleged that he is a member in good standing and was employed by the union as a staff representative for 11 years until his discharge in September 1966. Petitioner further alleged that he was unlawfully disciplined in that he was discharged for exercising his right of free speech under § 101 (a) (2) of the LMRDA, 29 U.S.C. § 411 (a) (2), in violation of the unlawful discipline prohibitions of § 609 of the LMRDA, 29 U.S.C. § 529.

On June 26, 1970, the defendant union filed a 12 (b) motion to dismiss based upon four grounds: (1) prior action pending; (2) principles of *res judicata;* (3) principles of collateral estoppel, splitting causes of action, and election of remedies; (4) want of jurisdiction and failure to state a claim upon which relief could be granted. In support of its motion to dismiss, the defendant union submitted two memorandums of law. But at no time did the union file a motion for summary judgment, nor were any affidavits, interrogatories, depositions, or other matters outside the pleadings submitted by the union to the district court. No record of a prior NLRB proceeding which allegedly formed the basis of the defense of collateral estoppel was submitted to the district court.

The district court, having given petitioner no notice

of its contemplation of summary judgment nor a hearing on summary judgment, rendered summary judgment for the defendant based on principles of collateral estoppel, said judgment entered on August 13, 1970 (Appendix A). Petitioner was not given a hearing or afforded an opportunity to present material in opposition to summary judgment as required by Rule 56 (c) of the Fed. R. Civ. P. Motions for reconsideration were filed by both parties, and said motions were overruled by judgment entered November 16, 1970 (Appendix B).

In its decision the district court noted several times that petitioner had stated a claim upon which relief could be granted under LMRDA, but held that relief was barred under principles of collateral estoppel by the prior NLRB adjudication. The district court concluded, without having the record of the NLRB proceeding before it, that the controlling issues of fact surrounding petitioner's discharge from union employment had been determined adversely to petitioner by the NLRB. The NLRB decision had been affirmed by the Fifth Circuit Court of Appeals in *Nix v. NLRB*, 418 F. 2d 1001 (5th Cir. 1969). The Court of Appeals had upheld the finding of the Board that petitioner's discharge from employment did not constitute an unfair labor practice under §§ 8 (a) (1) or 8 (a) (3) of the NLRA.

On appeal of the instant LMRDA action to the Court of Appeals petitioner raised two basic contentions. First, that the district court's entry of summary judgment violated petitioner's procedural and substantive rights under Rules 12 (b) and 56 (c) of the Fed. R. Civ. P. Secondly, that as a matter of law the NLRB had no jurisdiction to adjudicate LMRDA claims, therefore no *public* action to enforce petitioner's rights under §§ 8

(a) (1) and 8 (a) (3) of the NLRA could estop a private civil action to enforce petitioner's rights under §§ 101 (a) (2) and 609 of the LMRDA. Without addressing itself to the question of petitioner's procedural rights, the Court of Appeals affirmed the entry of summary judgment based on principles of collateral estoppel on November 17, 1971 (Appendix C), and denied a timely petition for rehearing on January 5, 1972 (Appendix D).

Although it is petitioner's contention that as a matter of law the NLRB decision cannot estop petitioner from prosecuting his LMRDA action, perhaps a brief summary of the NLRB proceeding will serve to aid the Court's understanding of both the jurisdictional dilemma to which petitioner has been subjected and the jurisdictional implications of an NLRB proceeding collaterally estopping an LMRDA action. Accordingly, a summary of the NLRB proceeding is included in the Appendices hereto as Appendix E.

REASONS FOR GRANTING THE WRIT

The issuance of a writ of certiorari to review the decision of the court below is sought upon the cumulative bases that: (1) the court below has so far sanctioned a departure of the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; (2) the decision of the court below conflicts with its own prior decisions and with the decisions of other courts of appeals; (3) the court below has decided a federal question in a way in conflict with applicable decisions of this Court; and (4) the court below has decided important questions of federal law which have not been, but should be settled by this Court.

I

COMPLAINT STATING CLAIM FOR RELIEF MAY NOT BE DISMISSED BY SUMMARY JUDGMENT WITHOUT AFFORDING PLAINTIFF NOTICE AND OPPORTUNITY TO BE HEARD.

It is important that the federal courts follow both the letter and the spirit of the Federal Rules of Civil Procedure. Without strict adherence to the procedural due process inherent in these rules, the substantive federal rights of plaintiffs may be rendered a nullity. Of all the possible abuses of the Federal Rules, none is more fatal to a plaintiff's substantive federal rights than the abuse of summary judgment procedure. Where the procedure of summary judgment is abused it is imperative that this Court exercise its power of supervision in order that important federal rights not go unenforced for lack of procedural due process in district courts.

Petitioner respectfully shows that the decision of the Court of Appeals below has completely nullified the right of all plaintiffs to notice and an opportunity to be heard prior to the entry of summary judgment. In addition to the fact that petitioner was denied a hearing on the issue of summary dismissal, the defendant union failed to carry the burden of showing that there was no genuine issue as to any material fact to be tried. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 160 (1970).

In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962), this Court set the following guidelines for the application of summary judgment procedure:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and

> admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56 (c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, * * * [and where] no genuine issue remains for trial * * * [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)."

In this proceeding, genuine issues as to petitioner's LMRDA rights remain to be tried. No forum has as yet adjudicated petitioner's discharge from employment in light of his right to seek out and expose union corruption under §§ 501 (b) and 101 (a) (2) of the LMRDA. If in truth the decision of the NLRB in an unfair labor practice proceeding—a proceeding wherein the NLRB had no jurisdiction over LMRDA claims and wherein LMRDA claims were neither presented to nor considered by the Board—is a bar to petitioner's enforcement of LMRDA rights in district court, then effectively petitioner is without a forum in which to try these issues. Clearly such a dilemma is the making of the Court of Appeals below, for Congress evidenced no such intent in §§ 102 and 103 of the LMRDA.

The decision of the Court of Appeals is contrary to its own prior decisions and the decisions of other courts of appeals upon the same matter.[1] In *Enochs v. Sisson*,

[1] The Court of Appeals decision is internally inconsistent as well. While the court below affirmed the district court's entry of summary judgment in Civil Action No. 13818, despite the fact that

301 F. 2d 125 (5th Cir. 1962), the court below held it an abuse of discretion to grant summary judgment without proper notice and hearing as required by Rule 56. In *Georgia Southern & Florida Railway Co. v. Atlantic Coast Line Railroad Co.*, 373 F. 2d 493, 497 (5th Cir. 1967), the court quoted in part from *Bowdidge v. Lehman*, 252 F. 2d 366, 368-369 (6th Cir. 1958):

> "* * * Rule 56 (c) provides that a motion for summary judgment requires service 'at least 10 days before the time fixed for the hearing.' We think the spirit of the rule requires the same notice and hearing where the court contemplates summary dismissal on its own motion. Since attorney for appellants was given neither notice nor opportunity to be heard upon the question of summary dismissal the judgment was erroneous."

Continuing its decision in *Georgia Southern*, the Court of Appeals for the Fifth Circuit referred to *Ullah v. Hoy*, 278 F. 2d 194 (9th Cir. 1960), in support of its own decision and at 373 F. 2d 498 held:

> "The notice requirements of Rule 12 guarantee that the automatic change of a motion to dismiss into a motion for summary judgment will not be accomplished by an unforeseeable thrust with no chance to parry. Notice

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only a memorandum of law had been presented to the court, the Court of Appeals also affirmed the district court's *refusal* to treat respondent's motion to dismiss as a motion for summary judgment in Civil Action No. 10463. Speaking of the latter action, the court below held:

> "By no stretch of the imagination can the Xerox copies of opinions of this court attached to a memorandum of law submitted by Grand Lodge in connection with the Rule 12 (b) (6) motions be said to constitute matters outside the pleadings sufficient to transform a Rule 12 (b) (6) motion into a motion for summary judgment." (Appendix C-7)

is ascendant and primary in the Federal Rules. They do not tolerate foils of obfuscation."

Stated most baldly, petitioner lost his case without a full opportunity to be heard. Petitioner respectfully urges that the correct application of summary judgment procedure is a matter of such ascendant importance to the federal judiciary that it is not too much for this Court to require that the proper application of summary judgment be universal among federal courts. Indeed, the decision of the Court of Appeals in affirming the district court's entry of summary judgment has so far sanctioned the district court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II

AS A MATTER OF LAW, PETITIONER'S LMRDA CLAIM IS NOT BARRED BY THE PRIOR NLRB PROCEEDING.

Petitioner respectfully shows this Court that the collateral estoppel effect of NLRB proceedings upon subsequent LMRDA actions, if any, is a question of utmost importance to all labor organizations and their millions of members throughout the nation. The question also bears most seriously upon the general enforcement of labor legislation in this nation and more specifically bears upon the jurisdiction of the federal courts over LMRDA claims. Essentially the question is addressed to the jurisdictional boundaries between the federal courts under the LMRDA and the National Labor Relations Board under the NLRA. To hold that an unfair labor practice proceeding before the NLRB is a bar to a subsequent LMRDA action is to hold that the NLRB has jurisdiction over LMRDA claims.

The implications of such a holding are of paramount importance to the enforcement of Congressional policy declared in the LMRDA.

This question is one which has not been but should be settled by this Court. The question posed is a logical extension of the preemption issue considered by this Court in *Boilermakers v. Hardeman*, 401 U.S. 233 (1971). In rejecting the union's argument that Hardeman's § 101 (a) (5) LMRDA cause of action was arguably an unfair labor practice within the exclusive competence of the NLRB, this Court held in *Hardeman* at 238-239:

> "The fairness of an internal union disciplinary proceeding is hardly a question beyond 'the conventional experience of judges,' nor can it be said to raise issues 'within the special competence' of the NLRB. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 181, 193-194 (1967). As we noted in that case, the 86th Congress which enacted § 101 (a) (5) was 'plainly of the view' that the protections embodied therein were new material in the body of federal labor law. 388 U. S., at 194. And that same Congress explicitly referred claims under § 101 (a) (5) not to the NLRB, but to the federal district courts. This is made explicit in the opening sentence of § 102: 'Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.' Of course, '[t]he purpose of Congress is the ultimate touchstone.' *Retail Clerks Local 1625 v. Schermerhorn*, 375 U. S. 96, 103 (1963). And in § 102 Congress has clearly indicated a purpose to refer claims regarding violation of § 101 (a) (5) to the district courts."

Clearly the forum for the determination of a claim under § 101 (a) (2) is the same as the forum for the determination of a claim under § 101 (a) (5).

The NLRA and the LMRDA are two different federal bodies of law. The exclusive jurisdiction of each act is vested in different forums; the scheme of enforcement is public in nature under the NLRA and private in nature under the LMRDA; and the measure of relief available under the acts is radically different. To hold that an NLRB unfair labor practice proceeding is a bar to a subsequent action in district court to enforce membership rights under the LMRDA is to ignore the above distinctions.

Petitioner respectfully shows this Court that the decision of the Court of Appeals for the Fifth Circuit cannot be allowed to stand. To allow an NLRB proceeding to bar a union member's claim under the LMRDA is to sanction the preemption of the jurisdiction of federal courts over the LMRDA by an administrative agency having no jurisdiction over the Act. In § 103 of the LMRDA Congress expressly preserved other state and federal rights in addition to LMRDA rights, but the effect of the Court of Appeals decision is to force an election between these remedies. No union member will in the future seek to enforce his rights under the NLRA if LMRDA claims which cannot be presented to or considered by the Board are thereby cut off by the doctrine of collateral estoppel. Clearly Congress in § 103 of the LMRDA did not intend that union members be put to such an election of rights or remedies.

A further implication of the Court of Appeals decision relates to the remedies available before the NLRB.

Assuming *arguendo* that the Board has the jurisdiction to entertain and accommodate LMRDA claims, the Board still cannot award damages and the other civil relief available in federal courts under the LMRDA. Had the Board, in its discretion, reinstated petitioner to employment based on his LMRDA rights, petitioner would nevertheless have had the right to pursue damages in an LMRDA action in federal court. The fact that the NLRB decided that petitioner's discharge was not for union activity cannot be allowed to eclipse petitioner's union member rights and remedies under the LMRDA. If the decision of the Court of Appeals is allowed to stand, union members who have claims under both the NLRA and the LMRDA will not seek the enforcement of their NLRA rights for fear that their broad remedies under the LMRDA will be cut off by the doctrine of collateral estoppel. Clearly such a result would defy the cumulative nature of LMRDA rights declared in § 103 of the Act.

The plain fact of the matter is that the NLRB will not entertain or consider LMRDA claims. (See Appendix E) The NLRB proceeding which adjudicated petitioner's unfair labor practice charges amply demonstrates that the Board will not consider internal union affairs, yet internal union affairs are the very essence of LMRDA claims. As desirable as it might have been for the Board to accommodate petitioner's LMRDA union membership rights, the Board lacked such jurisdiction. And apparently the NLRB is more conscious of its jurisdictional limitations than is the court below, which has given collateral estoppel effect to an NLRB proceeding in which petitioner's LMRDA rights were not even considered.

As a result of the variant standards between the NLRA and the LMRDA, the NLRB hearing did not adequately consider the factors necessary for an LMRDA violation. The trial examiner was primarily concerned with the question whether the petitioner's union activities led to his discharge. This is understandable considering that the trial examiner was only investigating a possible violation of the National Labor Relations Act. Consequently, he did not fully explore the union membership rights of petitioner under the LMRDA. Had he done so, he would have been acting beyond the scope of his authority since internal union affairs are not within the ambit of the NLRA. *Cf. Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 129 (6th Cir. 1971).

When respondent filed its motion to dismiss upon the ground of collateral estoppel by judgment, and requested the district court to take notice of the Court of Appeals decision in *Nix v. NLRB*, 418 F. 2d 1001 (5th Cir. 1969), no record of the prior NLRB proceeding was presented to the district court. But the affirmative defense pleaded by respondent imposed upon respondent the burden of showing that petitioner had a full opportunity, in fact as well as theory, to present evidence and argue his LMRDA claims before the NLRB. The respondent union did not carry that burden.

As a matter of law, petitioner had no right to control the proceedings before the NLRB. The Board has never been given jurisdiction to enforce *private* rights. A charge of an unfair labor practice may be presented to the Board, but the person filing the charge does not become the actor in the proceedings. The Board is a public agency acting in the public interest, and no pri-

vate person or group, nor any employee or group of employees is chosen as the instrument of government to assure protection to the public from the described unfair conduct in order to remove obstructions to interstate commerce. *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, 264-65 (1940).

As a matter of fact, in the NLRB proceeding petitioner was not permitted to call, examine or cross-examine witnesses; was not allowed to participate in the presentation of evidence other than his own testimony; was not represented by counsel, could not object to testimony offered by respondent in the hearing, and was not permitted to make any argument before the trial examiner. Evidence has different relevance in the context of different statutes. In the NLRB proceeding, petitioner simply was not afforded an opportunity to litigate the circumstances of his discharge in the context of his LMRDA rights as a union member.

The decision of the Court of Appeals is in conflict with the decision of this Court in *United States v. Utah Construction & Mining Co.*, 384 U. S. 394, 422 (1966), wherein this Court held that *res judicata* may apply

> "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which *the parties have had an adequate opportunity to litigate* * * *." (emphasis supplied)

Clearly the decision below violates the principles thus stated, because the district court made no investigation into the adequacy of petitioner's opportunity to litigate LMRDA rights before the NLRB in the prior proceeding.

The decision below conflicts with the court's own prior decision in *Rachal v. Hill*, 435 F. 2d 59, 62 (5th Cir. 1970). There the Court of Appeals held that

> "* * * the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted *had a full and fair opportunity to litigate the issue in the prior proceeding* and that application of the doctrine will not result in an injustice to the party against whom it is asserted under the particular circumstances of the case." (emphasis supplied)

The Court of Appeals based its affirmance of the district court's entry of summary judgment upon its decisions in *H. L. Robertson & Associates, Inc. v. Plumbers Local No. 519*, 429 F. 2d 520 (5th Cir. 1970); and *Painters District Council No. 38 v. Edgewood Contracting Co.*, 416 F. 2d 1081 (5th Cir. 1969). These cases involved a claim for damages under § 303 of the Taft-Hartley Act [29 U.S.C. § 187], based upon secondary boycotts in violation of § 8 (b) (4) of the NLRA [29 U.S.C. § 158 (b) (4)]. In each case the secondary boycott question was first presented to the NLRB and in both cases the Board found the existence of a secondary boycott. In subsequent damage actions under § 303 of Taft-Hartley, the Board's findings were pleaded as *res judicata* to the issue of liability in the district courts. Both courts granted summary judgment on the issue of liability and the Court of Appeals affirmed.

These two cases are inapposite. Both the NLRB and the district courts had *primary* jurisdiction to determine the existence of a secondary boycott. In each case before the Board, both parties to the dispute were accorded a full hearing on the secondary boycott question; both parties were represented by counsel, with full op-

portunity to present evidence, call, examine and cross-examine witnesses; and fully develop their positions before the Board.

In contrast, the NLRB lacks jurisdiction to adjudicate the claims of union members alleging an infringement of their rights under the LMRDA. Indeed, petitioner's LMRDA claims in this action were never presented to or considered by the NLRB, nor by the Court of Appeals for the Fifth Circuit in *Nix v. NLRB*, 418 F. 2d 1001 (5th Cir. 1969). Both the Board and the Court of Appeals considered petitioner's discharge only with respect to unfair labor practices affecting his status as an employee. Petitioner in the case at bar now simply seeks to have the circumstances of his discharge considered in light of his rights and duties as a *union member*.

CONCLUSION

It is important that this Court decide both of the questions posed by this appeal. If this action is simply remanded to the district court for a hearing in conformity with Rules 12 (b) and 56 (c) of the Federal Rules of Civil Procedure, there is nothing to indicate that the court will not reapply principles of collateral estoppel. Both the district court and the Court of Appeals have already held that the prior NLRB proceeding is a bar to petitioner's present LMRDA action. Petitioner has no reason to believe that these courts would decide the same question any differently in the future unless otherwise directed by this Court. Thus petitioner may be exposed to the expense and delay of another appeal to this Court unless this Court rules, as a matter of law, that an NLRB adjudication of a union

member's unfair labor practice charges is not a bar to such member's subsequent action in district court to enforce his rights under the LMRDA.

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Petitioner,

By _____
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above and foregoing Petition for Certiorari upon the respondent by mailing a copy of same, with postage first class prepaid, addressed to Adair, Goldthwaite, Stanford & Daniel, 600 Rhodes-Haverty Building, Atlanta, Georgia 30303, counsel of record for respondent.

This _____ day of March, 1972.

_____
WILLIAM G. MCRAE
Counsel for Petitioner